

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.169 OF 2014

(An Appeal arising out of the conviction and sentence of Hon. C.C. Oluoch (Mrs.) - PM delivered on 7th November 2014 in Kiambu CM Cr. Case No.2848 of 2013)

DAVID MAINA

MUTHONI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

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JUDGMENT

The Appellant, David Maina Muthoni was charged with **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on 31st October 2013 at Cianda in Kiambu County, the Appellant, jointly with others not before court, while armed with a pistol robbed Moses Kimani Kang'ethe of two Samsung phones, Alcatel phone, a wrist watch and cash Kshs.4,000/- and at the time of such robbery used actual violence to the said Moses Kimani Kang'ethe (hereinafter referred to as the complainant). When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged. He was sentenced to death. The Appellant was aggrieved by his conviction and sentence. He has appealed to this court against the said conviction and sentence.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted essentially on the evidence of identification which was insufficient to sustain a conviction. He faulted the trial magistrate for relying on contradictory and flawed evidence to convict him. He took issue in the manner in which the trial court admitted into evidence the evidence of identification parade, which, according to him, was not conducted in accordance with the **Police Force Standing Orders**. He was aggrieved that his alibi defence had not been taken into consideration before the trial court arrived at the verdict to convict him. In the premises therefore, the Appellant urged the court to allow his appeal, quash his conviction and set aside the sentence that was imposed upon him.

During the hearing of the appeal, Ms. B. Rashid for the Appellant presented to court written submission in support of the appeal. Ms. Aluda for the State also presented to court written submission in opposition to the appeal. In addition, Ms. B. Rashid made oral submission to the effect that the Appellant had essentially been convicted on the evidence of identification. She submitted that at the time of the robbery, the complainant was in shock having had a pistol pointed at him to an extent that he could not remember his M-pesa PIN. She complained that the Appellant was detained for a long time by the police during which time the Appellant is purported to have been identified by the complainant in a police identification parade. She asserted that the said identification parade that the complainant is alleged to have identified the Appellant was not conducted in accordance with the **Police Force Standing Orders**.

Learned counsel reiterated that the complainant did not give the name of the Appellant in the first report that he made to the police and only referred to the Appellant as "**Neiya**" during the hearing of the case. No evidence was adduced by the prosecution to establish that indeed the Appellant was known as

“**Neiya**” to justify his conviction by the trial court. She took issue with the fact that the police failed to investigate the fact that subsequent to the robbery, the complainant was coerced to transfer a sum of Kshs.5,000/- to a mobile phone number that was registered to one Linus Wambui. She submitted that the complainant had testified that the person who robbed him was connected to the person who extorted money from him through mobile money transfer. In the premises therefore, the Appellant submitted that there was no evidence to support the finding made by the trial court to the effect that the prosecution had established its case on the charge of robbery with violence against the Appellant to the required standard of proof beyond any reasonable doubt. The appeal should therefore be allowed.

Ms. Aluda for the State conceded to the appeal. She submitted that the Appellant was convicted on the basis of alleged evidence of recognition. She stated that, from the evidence adduced by the complainant and his wife, it was clear that the circumstance in which the robbery is said to have taken place and the nature of their relationship with the Appellant (he was alleged to have been a former casual labourer of the complainant), it was improbable that the complainant would have failed to give a description and the name of the Appellant to the police in the first report that was made to the police. She explained that there was contradiction in the manner in which the complainant and his wife testified as regards their relationship with the Appellant. This raised reasonable doubt that indeed the Appellant was identified or recognized during the night of the robbery. The fact that the police thought it necessary to mount a police identification parade to enable the complainant identify the Appellant was a clear indication that there was reasonable doubt raised as to whether the complainant knew the Appellant before the robbery incident as he claimed. Since there was no other evidence connecting the Appellant with the robbery, Ms Aluda conceded to the appeal and urged the court to allow the appeal.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced before the trial court so as to arrive at its own independent determination whether or not to uphold the conviction of the Appellant. In doing so, this court is required to be mindful of the fact that it neither saw nor heard the witnesses as they testified and therefore cannot make any comment regarding their demeanor (See **Njoroge –vs- Republic (1987) KLR 19**). The issue for determination by this court is whether the prosecution established the charge of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code** brought against the Appellant to the required standard of proof beyond any reasonable doubt.

The facts of this case are rather straight forward. On 31st October 2013, PW1 Moses Kimani Kang’ethe (the complainant) and his wife PW2 Nancy Wahu Kimani were at their home at Kimorori in Kiambu County. The complainant and his wife are elderly couple who lived alone at the time. The complainant testified that he woke up in the morning at about 6.30 a.m. and went to his farm to change the irrigation system in his tea plantation. From his evidence, it was evident that it was still dark at the time. While walking out of his house, he was confronted by three men who pointed a pistol at him. He was escorted back to the house where the three men ransacked the house and stole from them their mobile phones, cash and a wrist watch. In the course of the robbery, PW2 was ordered to transfer money from her M-Pesa Account to a number that was given to them by the robbers.

According to the complainant and his wife, they were able to recognize the Appellant as being in the gang of the robbers that attacked them. They referred to the Appellant as “**Neiya**”. Whereas the complainant testified that the Appellant previously worked for them as a casual labourer, PW2 testified that the Appellant used to buy vegetables from them. What was instructive was that in the first report that the complainant made to the police, it was apparent that he did not mention to the police the fact that he knew one of the robbers. On 1st November 2013, the complainant alleged that the Appellant called them through his wife’s mobile number. He was ordered to transfer a further sum of Kshs.5,000/- to a number given to them by the caller. The complainant complied and sent the money to the number. The recipient of the cash was one Linus Wambui. It was clear from the evidence adduced before the trial court that the police did not investigate this crucial angle of the case. If indeed money was transferred from the complainant’s wife mobile number through an M-Pesa transaction, nothing would have been easier than the police to trace the recipient and investigate the recipient’s connection with the robbery.

After the Appellant’s arrest on 13th November 2013, a police identification parade was conducted by

PW3 Inspector Robert Ojwang on 19th November 2013. In the identification parade, the complainant is alleged to have identified the Appellant. This court wondered why the police thought it necessary to mount the identification parade if indeed the complainant had indicated to them that he knew the Appellant prior to the robbery incident. What was clear from the evidence was that the police appeared to have been groping in the dark desperately looking for evidence to connect the Appellant to the robbery incident.

On re-evaluation of the evidence adduced before the trial court and the submission made before this court, it was clear that the evidence adduced before the trial court was insufficient to connect the Appellant to the robbery. The evidence of recognition that was adduced by the prosecution witnesses was riddled with inconsistencies that this court has no doubt in its mind that the threshold established by the law that the prosecution must establish its case to the required standard of proof beyond any reasonable doubt was not met. Further, as noted above, the police did not investigate all angles of the case. The complainant testified that in the course of the robbery, money was transferred from PW2's M-Pesa Account to an account that was supplied by the robbers. This was direct evidence which could be verified by the police. The police did not investigate a person by the name Linus Wambui to whom the complainant testified that money was transferred to by M-Pesa. These gaps in the prosecution's case raised reasonable doubt that indeed the Appellant participated in the robbery in question.

In the premises therefore, this court formed the view that the State, correctly, conceded to the appeal. The Appellant's appeal has merit and is hereby allowed. The Appellant's conviction is quashed and the sentence imposed upon him is set aside. The Appellant is ordered set at liberty forthwith and released from prison unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 13TH DAY OF JULY 2016

L. KIMARU

JUDGE